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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. .

BOARD OF DIRECTORS AND OFFICERS, FORBES FEDERAL CREDIT UNION, CHARTER NO. 11258, FORBES AIR FORCE BASE, TOPEKA, KANSAS,
Petitioners,

v.

NATIONAL CREDIT UNION ADMINISTRATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on April 26, 1973.

CITATIONS TO OPINIONS BELOW.

The Opinion of the United States Court of Appeals for the Tenth Circuit, docket number 72-1351, dated and filed April 26, 1973, reproduced in Appendix A hereto, is as yet unreported.

JURISDICTION.

The judgment of the United States Court of Appeals for the Tenth Circuit was dated and entered on April 26, 1973. Jurisdiction to review the judgment in question is conferred on this Court by Section 1254(1) of the Judicial Code of 1948, 63 Stat. 928, 28 U. S. C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Is not an agency of the executive branch precluded from unilaterally and substantially changing the provisions of a federal credit union's charter, contrary to the procedure for amendment as set forth by Congress in Section 104 of the Federal Credit Union Act, 12 U. S. C. § 1754?

2. In view of the statutory provision authorizing the chartering of federal credit unions in which the membership "may consist of groups having a common bond of occupation or association", is not the National Credit Union Administration as the administrative supervisory agency, precluded from imposing an interpretation of said statute, inconsistent with and contrary to the express provisions contained therein?

3. Having twice approved a specific provision of a federal charter expressly delineating the field of membership, is not the National Credit Union Administration, as grantor of the charter, precluded from effectively changing same without the consent of the grantee credit union?

4. Is not the National Credit Union Administration as an administrative agency precluded from imposing substantive conditions and restrictions upon a federal credit union by way of an informal "bulletin", contrary to the regulatory process expressly contemplated by Congress, as set forth in Section 120(a) of the Federal Credit Union Act, 12 U. S. C. § 1766(a)?

STATUTORY PROVISIONS INVOLVED.

Federal Credit Union Act.

12 U. S. C. 1753.

Federal credit union organization—Any seven or more natural persons who desire to form a Federal credit union shall subscribe before some officer competent to administer oaths an organization certificate in duplicate which shall specifically state—

(1) the name of the association;

(2) the location of the proposed Federal credit union and the territory in which it will operate;

(3) the names and addresses of the subscribers to the certificate and the number of shares subscribed by each;

(4) the par value of the shares which shall be $5 each;

(5) the proposed field of membership, specified in detail;

(6) the term of the existence of the corporation which may be perpetual; and

(7) the fact that the certificate is made to enable such persons to avail themselves of the advantages of this Act.

Such organization certificate may also contain any provisions approved by the Administrator for the management of the business of the association and for the conduct of its affairs and relative to the powers of its directors, officers, or stockholders.

12 U. S. C. 1754.

Approval of organization certificate—The organization certificate shall be presented to the Administrator for approval. Before any organization certificate is approved, an appropriate investigation shall be made for the purpose of determining (1) whether the organization certificate conforms to the provisions of this chapter; (2) the general character and fitness of the subscribers thereto; and (3) the economic advisability of establishing the proposed Federal credit union. Upon approval of such organization certificate by the Administrator it shall be the charter of the corporation, and one of the originals thereof shall be delivered to the corporation after the payment of the fee required therefor. Upon such approval the Federal credit union shall be a body corporate and as such, subject to the limitations herein contained, shall be vested with all the powers and charged with all of the liabilities conferred and imposed by this chapter upon corporations organized hereunder.

12 U. S. C. 1759.

Membership—Federal credit union membership shall consist of the incorporators and such other persons and incorporated and unincorporated organizations, to the extent permitted by rules and regulations prescribed by the Administrator, as may be elected to membership and as such shall each, subscribe to at least one share of its stock and pay the initial installment thereon and the entrance fee; except that Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district. Shares may be issued in joint tenancy with right of survivorship with any persons designated by the credit union member, but no joint

tenant shall be permitted to vote, obtain loans, or hold office, unless he is within the field of membership and is a qualified member.

12 U. S. C. 1766(a).

Certain powers of the Administrator—(a) The Administrator may prescribe rules and regulations for the administration of this chapter (including, but not by way of limitation, the merger, consolidation, and dissolution of corporations organized under this chapter).

12 U. S. C. 1769(b).

(b) The right to alter, amend, or repeal this chapter or any part thereof, or any charter issued pursuant to the provisions of this chapter, is expressly reserved.

STATEMENT OF THE CASE.[1]

This is an appeal from the United States Court of Appeals for the Tenth Circuit's judgment affirming the Administrator of the National Credit Union Administration, directing petitioner first, to cease and desist from *interpreting or construing* the field of membership provision in Petitioner's charter, contrary to the "interpretation" of the Administrator, and secondly, to cease and desist from enrolling members that are not within the field of membership so "interpreted" by the Administrator.

The Forbes Federal Credit Union (Forbes), located at Forbes Air Force Base at Topeka, Kansas is organized under the Federal Credit Union Act and was supervised by the Bureau of Federal Credit Unions' successor agency, the National Credit Union Administration, respondent.

As a result of the desire by Forbes to expand its field of membership, the Bureau of Federal Credit Unions, by letter dated April 24, 1967, agreed to permit an amendment to Forbes' charter to include "*members of the U. S. Armed Forces, active or retired, or their dependents or dependent survivors who are eligible by law or regulations to receive benefits or services from the above military installations.*" (Tab 37, Ex. G-5, G-6). This charter amendment was acceptable to Forbes; the final certificate of approval was duly executed by the Bureau of Federal Credit Unions on May 5, 1967 (Tab 37, Ex. G-7, G-8).

In November 1969, petitioner requested the Bureau to approve another charter amendment (unrelated to the issues here), further expanding its field of membership (Tab 37, Ex. G-2, p. 4). The Bureau again approved the

1. Footnote references are to the certified record which consists of 37 "Tabs." All Exhibits admitted into evidence which are collected in Tab 37 are further classified as "G" or "R." References will therefore be made by giving the Tab number and the Exhibit number. For example: (Tab 37, Ex. G-5).

request. However, the revised field of membership provision which it sent to petitioner in December 1969, contained not only the requested amendment but also the words '. . . and are receiving' added to the charter provisions in dispute so that the proposed charter amendment read in pertinent part as follows: ". . . Members of the U. S. Armed Forces, active or retired, or their dependents or dependent survivors, who are eligible by law or regulation to receive *and are receiving* benefits" from Forbes Air Force Base (emphasis supplied) (Tab 37, Ex. R-6). Forbes promptly returned this statement of its field of membership to the Bureau's Regional Office, requesting that the amendment be retyped, omitting the limiting provision ". . . and are receiving" (Tab 37, R-7). In January 1970, the Administration agreed, and returned the charter amendment to petitioner with the words ". . . and are receiving" deleted (Tab 37, R-8). Subsequently, the amendment to the field of membership charter provision was finally signed by the Bureau of Federal Credit Unions in Washington, D. C., by J. Deane Gannon, Director, with the words ". . . and are receiving" expressly and deliberately omitted (Tab 37, R-8).

Thus, on not one but *two separate occasions*, the respondent Administrator expressly agreed to charter amendments with the words "and are receiving" omitted from the field of membership provision.

This fact notwithstanding, the National Credit Union Administration rather arbitrarily contended that Forbes' field of membership charter provision should be interpreted as if the words ". . . and are receiving" were inserted as illustrated below:

> "Members of the U. S. Armed Forces active or retired, or their dependents or dependent survivors who are eligible by law or regulations to receive *and are re-*

ceiving benefits or services from the above military installation".

As previously stated, petitioner had never amended its charter in this manner.

Forbes has consistently contended that its charter as amended is a contract and should be interpreted by the usual or ordinary meaning of its provisions, and that the addition of the words ". . . and are receiving" by interpretive fiat, is not only unreasonable but is also merely an illegal attempt by the Administrator to unilaterally amend the charter, contrary to the substantive and procedural provisions of the Federal Credit Union Act, as well as the procedure provided in the Act and even the regulations of the Administration itself governing the amendment of charters.

The Administrator issued a "Notice of Charges" on July 13, 1971, contending that Forbes violated its charter by serving persons who were outside its field of membership (Tab 1).

In his Notice of Charges, the Administrator stated that Forbes sent a representative to Seward Air Force Base in Tennessee who accepted into its membership persons who possessed no real or projected "relationship" with Forbes Air Force Base. The persons that were accepted, however, all were eligible under the law to receive benefits and services from Forbes Air Force Base and as fellow U. S. Air Force personnel (both military or civilian) had, of course, a common bond of occupation or association as contemplated by the Act.

A hearing was held on August 24, 1971 before a Hearing Examiner appointed by the Administrator, who recommended finding against the Forbes Federal Credit Union (Appendix C, *infra*, p. A18). His recommendation

was adopted by the Administrator in his Final Decision and Order, which rather boldly stated that Forbes' field of membership charter provision

> [S]hall henceforth be interpreted to mean those members of the United States Armed Forces, active or retired, or their dependent survivors who are eligible by law or regulations to receive *and are receiving* benefits or services from the above military installation (emphasis supplied). (Appendix B, *infra*, p. A16-A17)

Upon petition for review, the U. S. Court of Appeals for the Tenth Circuit, its jurisdiction established by Section 206(i)(2) of the Federal Credit Union Act, 12 U. S. C. Sec. 1786(i)(2), heard argument and ultimately affirmed the Order of the Administrator. Judgment in accordance with the Opinion by the Honorable Robert H. McWilliams, Circuit Judge, was entered on April 26, 1973.

REASONS FOR GRANTING THE WRIT.

Stated summarily, the reasons for granting the writ are as follows:

1. The decision of the United States Court of Appeals for the Tenth Circuit involves an important question of Federal law directly affecting a substantial number of Federally chartered credit unions; a question which should be finally settled by this Court, i.e., does Section 109 of the Federal Credit Union Act which provides that Federal credit union membership *shall be limited to groups having a common bond of occupation or association or to groups within a well-defined neighborhood, community or rural district* require the imposition of a geographical limitation upon fields of membership based solely on the common bond of occupation or association?

2. The decision of the United States Court of Appeals for the Tenth Circuit has resulted in a radical departure from long-existing decisional law which precludes a sovereign from unilaterally and arbitrarily altering a provision of an existing charter. Such action which has been consistently proscribed since the decision of this Court in *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518 (1819) results in uncertainty in the law of contracts and specifically abrogates the binding effect of unambiguous charter provisions upon the Administration.

3. The decision of the United States Court of Appeals for the Tenth Circuit involves an important question of Federal law, affecting a substantial number of Federally chartered credit unions; a question which should be settled by this Court, i.e., may the National Credit Union Administration unilaterally amend the lawful charter of a credit union by means of an "interpretation", even though Section 104 of the Federal Credit Union Act (as well as

regulations promulgated thereunder) provides the exclusive procedure for effecting charter amendments?

4. The decision of the United States Court of Appeals for the Tenth Circuit involves an important question of Federal law directly affecting the nation's regulatory structure, i.e., can an administrative agency and specifically, the National Credit Union Administration, impose substantive conditions and restrictions by means of an informal "bulletin", contrary to the rule-making process expressly mandated by Congress in the Administrative Procedure Act, as well as Section 120 of the Federal Credit Union Act?

A detailed discussion of the reasons for granting the writ follows.

1. The Decision of the United States Court of Appeals for the Tenth Circuit Involves an Important Question of Federal Law Directly Affecting a Substantial Number of Federally Chartered Credit Unions; a Question Which Should Be Finally Settled by This Court, i.e., Does Section 109 of the Federal Credit Union Act Which Provides That Federal Credit Union Membership Shall Be Limited to Groups Having a Common Bond of Occupation or Association or to Groups Within a Well-Defined Neighborhood, Community or Rural District Require the Imposition of a Geographical Limitation Upon Fields of Membership Based Solely on the Common Bond of Occupation or Association?

As of the beginning of this year, over twelve thousand seven hundred Federally chartered credit unions existed in the United States, serving over thirteen million members. These same credit unions enjoyed assets of over $12.3 billion [2]—all are potentially affected by the rather

2. Source: *N. C. U. A. Quarterly*, January 1973, at 53-54.

unique contentions of the Administrator regarding construction of the "common bond" as set forth in the Act.

The provision of the Act recited above essentially states that Federal credit union membership is limited to groups having a common bond of occupation or association, *or* to groups which are determined by some form of geographical parameter. Thus, by its very terms, Congress has posited two separate and distinct categories in which a "common bond" can exist—the first relates to professions or associations; members of the military for whom Forbes provided services fall into this category. By the express language of the statute, *no geographical limitation* on the profession or association has been imposed.

By way of direct contrast, however, Congress *did* impose a geographical limitation upon the latter category; separated by the disjunctive *or*, Congress recognized that the common bond may also be established by a well-defined neighborhood, community or rural district, all of which are simply geographical boundaries.

This clear statutory scheme notwithstanding, the Court of Appeals failed to recognize this rather evident distinction in its analysis of the statute. Instead, it simply emulated the strained, imprecise and improper Opinion of the hearing examiner who in turn, merely adopted the assertions of the administrative agency as to what "common bond" encompasses.

In summary, the Court of Appeals never attempted to ascertain whether the interpretation of "common bond" as expounded by the Administrator was compatible with the statute. To the contrary, the Court of Appeals rather simplistically adopted the position of the Administrator:

> In our view, such [petitioner's assertion] would violate the statutory provision that a federal credit union shall have a "common bond" one with the other as

that has been consistently interpreted by the Administrator. (Appendix A, *infra*, p. A13)

As a consequence, a geographical limitation has been imposed by the Court of Appeals upon the professional and associational "common bond", contrary to both the intent and mandate of Congress as manifested in Section 109 of the Act, 17 U. S. C. 1759.

2. The Decision of the United States Court of Appeals for the Tenth Circuit Has Resulted in a Radical Departure From Long-Existing Decisional Law Which Precludes a Sovereign From Unilaterally and Arbitrarily Altering a Provision of an Existing Charter. Such Action, Which Has Been Consistently Proscribed Since the Decision of This Court in *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518 (1819), Results in Uncertainty in the Law of Contracts and Specifically Abrogates the Binding Effect of Unambiguous Charter Provisions Upon the Administration.

It is fundamental law that a charter of a corporation is a contract; the general rules of contract law apply to the granting, amending or repealing of such charters. *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518 (1819). It is equally fundamental that in interpreting a contract "[t]he ordinary meaning of language throughout the country is given to words unless circumstances show that a different meaning is applicable." RESTATEMENT OF CONTRACTS § 235(a) (1932). The Comment to this section explains that "the ordinary sense of words both singly and in collocation is adhered to unless doing so would lead to some absurdity, or repugnance or inconsistency with the rest of the instrument. In such cases, so far as is necessary to avoid that absurdity or inconsistency but no further, the

ordinary sense of words may be modified and rules of grammar modified."

There is no question as to the meaning of the language in the Forbes Federal Credit Union charter. The words are clear. Under the Forbes charter all military personnel "eligible by law or regulations to receive benefits or services" from Forbes Air Force Base are eligible for membership in the Forbes Federal Credit Union (Tab 37, G-6).

It was the erroneous opinion of the Court of Appeals that the literal meaning of the provision should not be given effect, because the Administrator has no authority to grant a charter provision which does not comply with the law, and here the law in the form of the Administrator's interpretation of "common bond", requires that the words "and are receiving" be written into the Forbes charter provision.

Thus, by means of rather circuitous reasoning, the Court of Appeals essentially held that the words "and are receiving" should be read into the charter, because the Administrator has so stated. The Court also said that a literal reading of the words was contrary to the meaning that Congress intended the amendment to have. However, once again the court concluded that since the Administrator has no power to grant charter provisions that are "contrary to law" then this charter must be read as if the words "and are receiving" are included, not because Congress has so stated, but because the Administrator now interprets "common bond" so as to prohibit any other conclusion. The real effect of this rather imprecise reasoning is that having granted a charter (after preliminarily determining whether the charter or charter amendment complies with the applicable law as required by Section 104 of the Federal Credit Union Act, 12 U. S. C. 1754), the Administrator may "interpret" in such a way as to make unlawful the clear and unambiguous meaning of the provisions in

the charter. Specifically, the Administrator ordered Forbes to cease and desist from *interpreting or construing* the field of membership . . . in any manner other than as said field of membership *is interpreted* by the National Credit Union Administration to wit: . . . [the operative provision, which includes the words "and are receiving" then follows] (Appendix B, *infra*, p. A16). Unquestionably, such a method of "interpretation" is a radical departure from the law of contracts, and presents a precedent of questionable validity for the Administrator or any administrative agency to capriciously and illegally alter the clear and unambiguous meaning of federal charters.

A review of the legislative history of the Federal Credit Union Act as well as the Act itself fails to reveal any intent on the part of Congress to prohibit a field of membership provision that is large or broad. To the contrary, the Congressional Record for the year 1934 for April 25, at page 7260, shows a statement of a field of membership considered by Congress as adequate to meet the definition of "a common bond of occupation or association." One example there given is ". . . Municipal Credit Union of the City of New York (composed of city employees) has loaned $19,112,104 to 83,690 borrowers." Surely if this group has a "common bond" in the eyes of Congress, then "members of the U. S. Armed Forces, active or retired, or their dependents or dependent survivors who are eligible by law or regulations to receive benefits . . ." from the Forbes Air Force Base in Topeka, Kansas similarly defines a group with a "common bond".

Thus, the charter provision was not contrary to the law, the approval of the provision was within the power of the Administrator, and the Court of Appeals for the Tenth Circuit has seriously disturbed the heretofore settled law on the sanctity of charters.

3. The Decision of the United States Court of Appeals for the Tenth Circuit Involves an Important Question of Federal Law, Affecting a Substantial Number of Federally Chartered Credit Unions; a Question Which Should Be Settled by This Court, i.e., May the National Credit Union Administration Unilaterally Amend the Lawful Charter of a Credit Union by Means of an "Interpretation", Even Though Section 104 of the Federal Credit Union Act (as Well as Regulations Promulgated Thereunder) Provides the Exclusive Procedure for Effecting Charter Amendments?

The regulatory procedure pertaining to Federal credit union charter approval, including any subsequent amendments thereto, essentially provides for the preparation of an "organization certificate" which, when submitted and approved by the Administrator, becomes the charter of the credit union; 12 U. S. C. § 1754. However, before approval, the Administrator is expressly charged with the duty of ascertaining "whether the organization certificate [charter] conforms to the provisions of the Act"; 12 U. S. C. § 1754.

Further, by its very own regulations, the Administration requires that proposed charter amendments be first adopted by the credit union, but then:

> "No amendment of the by-laws or the charter shall become effective however, until approved in writing by the Administrator." 12 CFR § 701.4.

This regulatory provision has been implemented by Forbes in its by-laws by expressly providing that no amendment to the charter shall be effective until approved in writing by the Administrator.

This is the *only* procedure authorized by statute and regulation for effecting a charter amendment, a fact which

the Administrator's Regional Director precisely corroborated during oral testimony at the administrative hearing below (Tab 36, p. 268).

On *two separate occasions*, charter amendments were sought and obtained from the Administrator, following the above procedure. Although the Administrator had ample opportunity (and indeed the statutory duty) to review the proposed field of membership to assure compatibility with the law, at no time did he assert that insertion of the phrase ". . . and are receiving" was essential for the charter amendment to pass legal muster.

In fact, this was expressly rejected in the second proposed amendment, when the Administrator attempted to unilaterally insert the phrase ". . . and are receiving". When informed by Forbes that this phrase did not appear in the proposed amendment, as submitted for approval, the Administrator *promptly deleted* it and proceeded to approve the charter amendment, without the phrase.

Thus, by now insisting upon an "interpretation" of the charter provision which includes the phrase ". . . and are receiving" (Tab 1), the Administrator is essentially attempting to involuntarily impose a *de facto* charter amendment upon Forbes.

The regulatory power of the Administrator was clearly intended by Congress to provide for a *preliminary determination* of legal sufficiency. There is little point in submitting charters for approval, if, after they are in force, the Administrator can effect modification by "interpretation" by adding provisions that are different from the clear language of the charter as originally approved.

As the record clearly demonstrates, the Administrator has inconsistently insisted that the phrase ". . . and are receiving" be included in the proposed charter amendment, while contemporaneously approving others without this phrase (Tab 37, p. 175).

This question is of national importance; if the decision of the Court of Appeals for the Tenth Circuit is permitted to stand as the only existing precedent, it will be construed as authority for the Administrator to unilaterally amend charters of Federal credit unions without restriction, in direct contravention of the provisions of the Act, as well as his own administrative regulations. Section 123(b) of the Federal Credit Union Act, 12 U. S. C. § 1769(b) reserves to the Congress, the exclusive power to amend or alter any charter issued pursuant to the Federal Credit Union Act. To permit the Administrator to effectively accomplish the same result is clearly a usurpation by the executive branch of powers expressly reserved to the Congress.

4. The Decision of the United States Court of Appeals for the Tenth Circuit Involves an Important Question of Federal Law Directly Affecting the Nation's Regulatory Structure, i.e., Can an Administrative Agency and Specifically, the National Credit Union Administration Impose Substantive Conditions and Restrictions by Means of an Informal "Bulletin", Contrary to the Rule-Making Process Expressly Mandated by Congress in the Administrative Procedure Act, as Well as Section 120 of the Federal Credit Union Act?

Section 120(a) of the Federal Credit Union Act, 12 U. S. C. § 1766(a) provides that: "[T]he Administrator may prescribe rules and regulations for the administration of this chapter . . ." This is the sole source of his general rule-making power.

At no time, relevant to this action, did the Administrator promulgate any rules or regulations relating to the field of membership construction of the common bond.

Instead, reliance has been placed on an informal publication entitled "Bulletin of the Federal Credit Union"

(Tab 37, Ex. G-9). This "bulletin" which typically covers items such as the Edwards A. F. B. Women's Bowling Team (January 1973 edition); or a feature entitled "Tanzanians and Guatamalans Study Federal Credit Union Program" (October 1970 edition), can hardly be realistically regarded as a legally sufficient publication wherein *binding requirements* can be imposed upon Federal credit unions.

This fact notwithstanding, the Administrator has apparently contended that a relatively obscure article in the "Bulletin" setting forth his opinion as to the construction of the common bond—the very essence of the credit union movement—is somehow binding upon the credit unions under his supervision.

None of the traditional safeguards against arbitrary regulatory action, such as notice of proposed rule-making, opportunity to submit comments, etc., as set forth in the Administrative Procedure Act, 5 U. S. C. §§ 551-559, have been provided.

As a matter of fact, *not even the Agency itself* has required a geographical limitation for associational or professional credit unions as would seem to be indicated in the "bulletin". For example, the membership provision of the charter of the Pentagon Federal Credit Union, the fourth largest credit union in the United States with assets of more than $76 million,[3] includes a clause making eligible for membership "commissioned and warrant officers of the United States Army and United States Air Force" regardless of their duty station (Tab 37, R-1). Similarly, "Commissioned and Warrant Officers of the U. S. Navy and Marine Corps on active duty except active duty for training" are eligible for membership in the Navy Federal Credit Union (Tab 37, R-2) again without any geographical

3. Source: *N. C. U. A. Quarterly*, January 1973, at 17.

limitation whatsoever (Tab 36, p. 95). The Navy Federal Credit Union is the largest credit union in the United States with assets of more than $216.5 million.[4] It is further noted that virtually simultaneously with the decision of the court below, the respondent rather inconsistently granted a charter to the United Mine Workers, for a Federal credit union to serve some 200,000 UMWA members and their families *throughout the United States;* the Administrator expressly found that the requirements of the common bond were fulfilled, notwithstanding the national scope of its field of membership.[5]

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD C. TOOLE, JR.,
FLOYD W. TOMPKINS,
CLARK, LADNER, FORTENBAUGH & YOUNG,
Counsel for Petitioners.

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4. Source: *N. C. U. A. Quarterly*, January 1973, at 17.
5. Source: The Credit Union Magazine, July 1973, at 20.

APPENDIX A.

Opinion of the United States Court of Appeals for the Tenth Circuit.

(Filed April 26, 1973)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARCH TERM—1973

NO. 72-1351

BOARD OF DIRECTORS AND OFFICERS, FORBES FEDERAL CREDIT UNION, CHARTER NO. 11258, FORBES AIR FORCE BASE, TOPEKA, KANSAS,

Petitioners,

v.

NATIONAL CREDIT UNION ADMINISTRATION,

Respondent.

PETITION FOR REVIEW OF ORDER OF NATIONAL CREDIT UNION ADMINISTRATION

Gerald W. Hyland (Dale W. Bruce and Robert L. Davis, of Davis, Bruce, Davis & Cather, on the brief), for Petitioners.

Edwin E. Huddleson, III, Attorney, Department of Justice (Harlington Wood, Jr., Assistant Attorney General, and Robert E. Kopp, Attorney, Department of Justice, on the brief), for Respondent.

Before HILL, McWILLIAMS, and BARRETT, *Circuit Judges*

McWILLIAMS, *Circuit Judge.*

This is a dispute between the officers and directors of the Forbes Federal Credit Union of Topeka, Kansas, and the National Credit Union Administration over the meaning of a 1967 amendment to the charter of the Forbes Federal Credit Union. The amendment in question relates to the eligibility requirements for membership in the Forbes credit union.

The matter was first heard by a Hearing Examiner designated by the Administrator of the National Credit Union Administration to conduct a hearing. After an extended evidentiary hearing, the examiner made elaborate findings and conclusions, and filed a "Recommended Decision," all of which was then adopted by the Administrator as his "Final Decision and Order." The officers and directors of the Forbes Federal Credit Union thereafter filed a petition in this court seeking direct judicial review by us of the Administrator's order, asking in connection therewith that we invalidate the order. 12 U.S.C. § 1786(i). Background facts will have to be developed if the narrow issue is to be seen in context.

A federal credit union is defined by statute as a "cooperative association organized * * * for the purpose of promoting thrift among its members and creating a source of credit for provident and productive purposes." 12 U.S.C. § 1752(1). The initial Act of Congress permitting the formation of such credit unions occurred in 1934.

In 1956, Forbes Federal Credit Union, hereinafter referred to simply as Forbes, was organized under the Federal Credit Union Act and was granted a charter by the Bureau of Federal Credit Unions, the predecessor agency to the National Credit Union Administration. 12 U.S.C. §§ 1771-1790. By its terms this charter permitted Forbes to serve military personnel permanently assigned to the Forbes Air Force Base in Topeka, Kansas, and civilian personnel employed thereat.

In April 1967, Forbes was advised by the Bureau that it could apply for an amendment to Section 5 of its charter which would permit it to extend its credit union services to a somewhat larger field of membership. Application for such charter amendment was made by Forbes, and the application therefor was approved by the Bureau on May 5, 1967. Section 5 of Forbes' charter, as thus amended by the so-called 1967 amendment, reads as follows:

> "The field of membership shall be limited to those having the following common bond: Civilian employees and military personnel of the Department of the Air Force who work at and are permanently assigned to the Forbes Air Force Base in Topeka, Kansas; *members of of the U. S. Armed Forces, active or retired, or their dependents or dependent survivors who are eligible by law or regulation to receive benefits or services from the above military installation;* members of this credit union who are stationed at military bases overseas and retain their membership in this credit union; employees of this credit union; members of their immediate families; and organizations of such persons." (Emphasis added.)

The underlined portion in the foregoing constitutes the so-called 1967 charter amendment and the present controversy concerns the meaning of that particular language.

By way of additional background, this particular charter change came about as the result of a request from the Department of Defense to the Bureau that eligibility requirements be altered so as to permit membership in a local federal credit union by military personnel who were "geographically separated" from their parent organization and were receiving normal services such as, for example, commissary and exchange services, from the nearest military base providing such services. More particularly, in this regard the Department of Defense wrote as follows:

> "* * * In order to correct this situation, [we] request your consideration of an amendment to BFCU regulations which would permit a member of the armed services, either active or retired or his legal survivors, to become a member of a credit union located on the military installation which provides other services to that member or survivor. * * *"

As a result of that request, the Bureau authorized amendments to the charters of several local federal credit unions of the same type granted Forbes. Inquiry was soon made to the Bureau as to whether such amendment permitted local credit unions to enroll as members any and all military personnel who were eligible to receive services at their particular military installation, regardless of whether they had actually received any benefits or services from the military base where the particular credit union was located. In this regard, apparently all military personnel, wherever located geographically, are "eligible" to receive benefits and services from any military base, even though they may never do so. In response to these inquiries, the Bureau issued a memorandum to all of its regional representatives and examiners in June 1967, interpreting the 1967 Amendment as follows:

> "The Bureau interprets the [1967 Amendment] as applying only to those persons who are so situated that they can and in fact do utilize the benefits or services provided by the named installation. This is necessary to assure that the person is a part of the military community of the installation."

The foregoing "interpretation" of the so-called 1967 Amendment was generally announced to the federal credit union industry and in October 1967 the Bureau's bulletin specifically advised all Department of Defense affiliated

credit unions, including Forbes, of its interpretation in the following language:

> "To avoid any misunderstanding as to who would be eligible for membership by the adoption of the amendment, the following interpretation should be used as a guide:
>
> 'Those people who are so situated that they can and in fact do, make fairly regular use of the benefits and services provided by the named installation.'
>
> "This is necessary to assure that the person is a part of the military community of the installation."

In 1968, the Bureau amended the 1967 Amendment to the end that charter amendments approved thereafter read as follows:

> "[M]embers of the U. S. Armed Forces, active or retired, or their dependents or dependent survivors who are eligible by law or regulations to receive *and are receiving* benefits or services from the above military installation."

The italicized portion of the foregoing was added in 1968 to the wording of the 1967 Amendment, which addition was in line with the Bureau's prior "interpretation" of the 1967 Amendment. However, prior to the 1968 change, many local federal credit unions, including Forbes, had their charters amended in language of the 1967 Amendment, which did not include the words "and are recieving." And Forbes, at least, does not agree with the Bureau's interpretation of the 1967 Amendment.

Forbes' position, in a nutshell, is that the 1967 Amendment should be interpreted just as it reads, and that under the 1967 Amendment, Forbes is entitled to enroll as mem-

bers any and all military personnel who are "eligible" to receive benefits and services from Forbes Air Force Base, regardless of whether the military personnel have ever in fact received any benefit or service at Forbes Air Force Base. Under such interpretation, as we understand it, Forbes could enroll as a member in its credit union military personnel located anywhere around the world, since all are "eligible" to receive benefits and services at Forbes Air Force Base, regardless of whether the individual sought to be enrolled has ever in fact received any benefit or service at Forbes Air Force Base. And, conversely, we assume that other credit unions with a similar charter amendment could invade Forbes Air Force Base and enroll military personnel attached to that installation.

These differing interpretations by Forbes and the Bureau of the former's 1967 charter amendment were known and recognized by each of the parties, but apparently did not come to a head till May 1969. In April 1969, the president of Forbes advised the Bureau that in his view the 1967 Amendment authorized Forbes to enroll as members any person in the military service, notwithstanding the Bureau's narrower interpretation. Despite a warning from the Bureau, Forbes, in May 1969, set up a so-called "branch office" at Sewart Air Force Base in Tennessee. More specifically, in May 1969 Forbes sent a representative to Sewart who conducted extensive business with military personnel on that base until March 1970, accepting, for example, some 1150 new members. There is some suggestion that Sewart Air Force Base was at the time in the process of being deactivated. In any event, some of the newly enrolled members were eventually transferred to Forbes Air Force Base in Topeka. However, other newly enrolled members were never transferred to Forbes Air Force Base and in fact were eventually transferred to other military installations.

In November 1970, the National Credit Union Administration, that agency having succeeded by Act of Congress to the powers and duties of the old Bureau, formally requested Forbes to abide by its interpretation of the 1967 Amendment. Forbes refused, and as a result of such refusal the Administrator on July 13, 1971, issued a Notice of Charges to Forbes and its Board of Directors, charging them with improperly expanding its membership. The matter was then referred to a Hearing Examiner to determine if a cease and desist order should issue to compel Forbes to follow the Administration's interpretation of the 1967 Amendment. As indicated, after hearing the Hearing Examiner made detailed findings and conclusions and recommended the issuance of such a cease and desist order. The ruling applied only prospectively, incidentally, and did not affect new members enrolled by Forbes up to that time. The recommended action of the Hearing Examiner was approved and adopted by the Administrator, whereupon Forbes initiated this action in this court, seeking a review of that order and asking that we invalidate it.

As indicated, it was Forbes' position before the Hearing Examiner, as it is here, that under a literal reading of the 1967 charter amendment it had the right to enroll as members in its credit union all military personnel "eligible by law or regulations to receive benefits or services" from Forbes Air Force Base, whether they did so in fact or not. In line with this interpretation, Forbes denies that it was in anywise violating its charter in going to Sewart Air Base in Tennessee and enrolling military personnel at that installation, even though many such enrollees were not transferred to Forbes Air Force Base and never received any services or benefits from that base. In thus contending, Forbes argues that the words used in the 1967 charter amendment are clear, plain and unambiguous and should be

given their normal, natural meaning. Forbes places considerable emphasis on the reasoning contained in landmark case of Dartmouth College v. Woodward, 17 U.S. 518 (1819), concerning the sanctity of a charter, and the fact that a charter, once granted, cannot thereafter be unilaterally changed.

It was the position of the Administration before the Hearing Examiner, as it is here, that the interpretation sought by Forbes of the 1967 charter amendment is at odds with the Federal Credit Union Act, the rules and regulations of the Administrator of the National Credit Union Administration, and the contemporaneous interpretation given both the statute and the charter amendment by the administrative agency charged with administering and enforcing the Act. As indicated, the Hearing Examiner agreed with the position of the National Credit Union Administration, as did the Administrator. We do too. Let us first examine further the Federal Credit Union Act itself.

Section 1753, 12 U.S.C., provides, in part, as follows:

> "Federal Credit Union Organization—
>
> "Any seven or more natural persons who desire to form a Federal credit union shall subscribe before some officer competent to administer oaths an organization certificate in duplicate which shall specifically state—
>
> • • • • • •
>
> "(2) the location of the proposed Federal credit union and the territory in which it shall operate;
>
> "(5) the proposed field of membership, specified in detail."
>
> • • • • • •

The requirement of subsection 2 that the organization certificate shall "specifically state * * * the territory in

which it [the federal credit union] shall operate" is deemed to be of some significance. It indicates to us that Congress intended that a federal credit unit would operate within a described geographical territory and not round-the-world.

Concerning membership in a federal credit union, 12 U.S.C. § 1759 provides as follows:

> "Federal credit union membership shall consist of the incorporators and such other persons and incorporated and unincorporated organizations, to the extent permitted by rules and regulations prescribed by the Administrator, as may be elected to membership and as such shall each, subscribe to at least one share of its stock and pay the initial installment thereon and the entrance fee; except that Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well defined neighborhood, community, or rural district. * * *"

From the foregoing statutory provision we learn that it was the intent of Congress that members in a particular federal credit union should have a "common bond" with each other. More about this "common bond" requirement later, but we do note here that the "common bond" requirement has been deemed something more than simply the bond of mutually serving in the military. Also, it is apparent that Congress empowered the Administrator of the National Credit Union Administration to promulgate rules and regulations regarding those eligible to become members of a local federal credit union.

Concerning the powers of the Administrator, 12 U.S.C. § 1766 provides, in part, as follows:

> "(a) The Administrator may prescribe rules and regulations for the administration of this chapter (in-

cluding, but not by way of limitation, the merger, consolidation, and dissolution of corporations organized under this chapter).

"(b) (1) The Administrator may suspend or revoke the charter of any Federal credit union, or place the same in involuntary liquidation and appoint a liquidating agent therefor, upon his finding that the organization is bankrupt or insolvent, or has violated any of the provisions of its charter, its bylaws, this chapter, or any regulations issued thereunder."

Subsection (a) thus grants the Director, now the Administrator, the broad power to prescribe rules and regulations for the administration of the entire chapter and subsection (b) specifically grants him the power to suspend or revoke the charter of any federal credit union upon a finding that the local credit union has violated either the provisions of its own charter or bylaws, or has violated any provision of the chapter or any administrative regulation issued pursuant thereto.

Concerning the statutory requirement of a "common bond" referred to above, the Administrator under his statutory rule-making authority has long construed the "common bond" concept to restrict membership of credit unions located at military installations to persons who in fact receive at least some benefits and services from the installation where the credit union is itself located. As evidence of this, the following excerpt from an official publication of the Administration is pertinent:

"COMMON BOND

"The Bureau of Federal Credit Unions defines and explains common bond, as applied to Federal credit union chartering, as follows:

'Common bond is that pre-existing condition which causes the members of a group to associate together, to know each other, to have common interests and purposes, and to be able and willing to work together to accomplish group objectives. A group has a common bond when it is composed of people who have the same employer, or are otherwise associated through some common interest or enterprise, and are so situated in relation to each other as a consequence of that community of employment or association that they could be expected to operate effectively as a cooperative organization for credit union purposes.

'A group, to qualify for a Federal credit union charter, should provide opportunities for the members to associate together, and, as a result of such association, to develop common loyalties and mutual interests. Furthermore, in an associational group, the members must receive substantial benefit from membership in the association. * * *' "

The Hearing Examiner advanced two alternative bases upon which he determined that the interpretation given the 1967 charter amendment by the Administration was the proper one, and that the interpretation argued for by Forbes was improper. One such ground was that the interpretation contended for by Forbes was at variance with Congressional intent as expressed in the Act itself, as well as being at odds with the various rules and regulations of the Administration. He reasoned, in effect, then that the charter amendment should be interpreted in a manner that would square with the applicable statutes and rules and regulations. We agree with this conclusion.

As indicated earlier, 12 U.S.C. § 1786(i) provides for judicial review of an order of the Administrator of the Fed-

eral Credit Union Administration. And that statute states that our review shall be as provided in the Administrative Procedure Act. Section 706, 5 U.S.C., spells out the scope of our review of the order of the Administrator. Illustrative of the fact that in the instant case our review of the decision of the Administrator is not wide-ranging in scope, we note, for example, that administrative action has been held to be conclusive on review unless such action is not in accordance with law or is unsupported by competent, material and substantial evidence, or is arbitrary or capricious. Reconstruction Finance Corp. v. Lightsey, 185 F.2d 167 (4th Cir. 1950). With this in mind, then, let us examine the principles which in our view govern this controversy.

In the first place, no administrative body may contract with a corporate body which it regulates in a manner contrary to the statute which it is charged with administering, nor in a manner which would not give full effect to the intent of Congress. Peoples Bank v. Eccles, 161 F.2d 636 (D.C.Cir. 1947), *rev'd on other grounds,* 333 U.S. 426 (1947). In determining the intent of Congress, administrative interpretation, practice and usage are accorded great weight by a reviewing court where a particular statute is susceptible of different reading. Lindberg v. Brenner, 399 F.2d 990 (D.C.Cir. 1968); Garvey v. Freeman, 397 F.2d 600 (10th Cir. 1968); and H. B. Zachry Co. v. United States, 344 F.2d 352 (Ct.Claims 1965). So, it has been held that a court should not overturn an administrative interpretation of a statute which it is charged with administering unless it can be said that the interpretation is plainly erroneous. Jno. McCall Coal Co. v. Unted States, 374 F.2d 689 (4th Cir. 1967). Similarly, it has been stated that an administrative agency's interpretation of its own regulations is to be accorded great deference and is controlling as long as it is one of several reasonable interpretations, and even though

it may not appear quite as reasonable as some other. Roy Bryant Cattle Co. v. United States, 463 F.2d 418 (5th Cir. 1972). Finally, it is a well settled principle that where a contract is susceptible of two interpretations, preference will be given to the interpretation which does not violate the law. Great Northern Railway Co. v. Delmar Co., 283 U.S. 686 (1931).

Application of the foregoing principles to the instant controversy leads us to conclude that the order of the Administrator approving and adopting the findings, conclusions and recommendation of the Hearing Examiner is proper and correct. To approve, in effect, the earlier action of Forbes in going from Kansas to Tennessee to enroll new members simply because they were technically eligible to receive benefits and services at Forbes Air Force Base, though in fact they did not, would mean that in the future Forbes in its efforts to increase its membership could create a branch office at virtually any military installation, wherever located. In our view, such would violate the statutory provision that a federal credit union shall serve a described territory and that its members shall have a "common bond," one with the other, as that phrase has been consistently interpreted by the Administrator.

In sum, then, the order complained of is not plainly erroneous; and, on the contrary, in our view the Administrator has given the 1967 charter amendment a reasonable interpretation consonant with the Congressional mandate and the Congressional mandate and the regulations promulgated pursuant thereto.

Order affirmed.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
OFFICE OF THE CLERK
DENVER, COLORADO 80202

April 26, 1973

Gerald W. Hyland, Esquire
Attorney at Law
1730 Rhode Island Avenue, N. W.
Washington, D. C. 20036

Dale W. Bruce, Esquire and
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Re: No. 72-1351, Board of Directors and Officers, Forbes Federal Credit Union, etc. v. National Credit Union Administration

Gentlemen:

Enclosed is a copy of the opinion of the Court in the above case. Judgment in accordance with that opinion has been entered today.

Sincerely yours,

HOWARD K. PHILLIPS, Clerk.

By: LAVON M. IRLBECK,
Lavon M. Irlbeck,
Deputy Clerk.

lu
Enclosure

cc: Harlington Wood, Jr., Esquire, Assistant Attorney General; Edwin E. Huddleson, III and Robert E. Kopp, Esquires, Department of Justice, Washington, D. C. 20530

APPENDIX B.

Final Decision and Order of the National Credit Union Administration.

April 13, 1972

BEFORE THE NATIONAL CREDIT UNION ADMINISTRATION

In the Matter of
NATIONAL CREDIT UNION ADMINISTRATION

vs.

BOARD OF DIRECTORS AND OFFICERS
FORBES FEDERAL CREDIT UNION
CHARTER #11258
FORBES AIR FORCE BASE
TOPEKA, KANSAS

FINAL DECISION AND ORDER

Upon consideration of the entire record in the above captioned proceedings, including the attached Recommended Decision and Order of the Trial Examiner, the exceptions thereto filed by the Attorney for the Respondents, and the parties' briefs and replies thereto, the Administrator hereby adopts the attached Findings and Conclusions of the Trial Examiner.

WHEREAS, the exceptions by respondents raise no new or material matters of fact or law not adequately considered and properly disposed of by the Trial Examiner in his recommended decision, and

WHEREAS, each and every exception of the respondent is contrary to the facts and the law as properly and correctly found by the Trial Examiner in his recommended decision,

THE ADMINISTRATOR FINDS, after thoroughly considering and weighing each individual exception, the evidence considered in light of these exceptions does not warrant a result different from that reached by the Trial Examiner.

WHEREFORE, and good cause appearing therefor, the Adminstrator finds that the attached Statement of Facts, the Conclusions and Findings of the Trial Examiner, being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as my own.

Accordingly, the Forbes Federal Credit Union, Charter No. 11258, its Directors, Officers, Committee Members, Employees, and Agents are hereby ORDERED

(1) To cease and desist from interpreting or construing the field of membership as set forth in the charter of the Forbes Federal Credit Union in any manner other than as said field of membership is interpreted by the National Credit Union Administration, to wit: The words "Members of the Armed Forces, active or retired, or their dependent survivors who are eligible by law or regulations to receive benefits or services from the above military installation" shall henceforth be interpreted to mean those members of the United States Armed Forces, active or retired, or their dependent survivors who are eligible by law or regulations

to receive and are receiving benefits or services from the above military installation.

(2) To cease and desist from enrolling members, and accepting deposits from or making loans to persons, who are not within the field of membership of said credit union as interpreted by the National Credit Union Administration in paragraph (1) of this Order.

HERMAN NICKERSON, JR.
Administrator
National Credit Union Administration

Date: 13 April 1972

APPENDIX C.

Recommended Decision of the Trial Examiner of the National Credit Union Administration.

NATIONAL CREDIT UNION ADMINISTRATION

January 10, 1972

IN THE MATTER OF
NATIONAL CREDIT UNION ADMINISTRATION

vs.

BOARD OF DIRECTORS AND OFFICERS
FORBES FEDERAL CREDIT UNION
CHARTER NUMBER 11258
FORBES AIR FORCE BASE
TOPEKA, KANSAS

RECOMMENDED DECISION

Appearances:

Brian H. Rhatigan
Assistant General Counsel
National Credit Union Administration
Washington, D. C. 20456
for the National Credit Union Administration

Davis, Bruce & Davis
by Dale W. Bruce, Esq.
Suite 712, Union Center Building
First and Main Streets
Wichita, Kansas 67202
for the Board of Directors and Officers and
the Forbes Federal Credit Union

STATEMENT

This matter commenced on July 13, 1971, when Herman Nickerson, Jr., Administrator of the National Credit Union Administration, (hereinafter the Administrator and Administration respectively), pursuant to the provisions of Section 206(e)(1) of the Federal Credit Union Act, 12 U.S.C. 1786(e)(1), (12 U.S.C. 1751-1790, hereinafter the Act), issued a Notice of Charges to the Board of Directors and Officers of and to the Forbes Federal Credit Union, Charter Number 11258, located at the Forbes Air Force Base, Topeka, Kansas.

This Notice alleges that the Board of Directors and Officers of the Forbes Federal Credit Union have not effectively controlled the affairs of the Forbes Credit Union (hereinafter this Credit Union) as such affairs relate to the amendment of this Credit Union's charter as approved by the Bureau of Federal Credit Unions (hereinafter the Bureau)[1] on May 5, 1967. This failure to exercise effective control, it is alleged, is not consistent with the responsibilities and duties of the said Board of Directors and Officers as set forth in this Credit Union's By-laws and in the Act; is contrary to the best interests of the members of this Credit Union, and is the result of the Board of Directors' and Officers' non-compliance with the understanding and intent commensurate with the approval of the May 5, 1967, amendment,

1. The administration of the Federal Credit Union Act since its passage on June 26, 1934, has been vested in various authorities beginning with the Farm Credit Administration (48 Stat. 1216). Thereafter there was legislatively created the Bureau of Federal Credit Unions headed by a Director within the Department of Health, Education and Welfare (73 Stat. 628). On March 10, 1970, Congress established the National Credit Union Administration, headed by an Administrator as an independent agency in the Executive Branch of the Government. (Pub. L. 91-206; 84 Stat. 49; 12 U.S.C. 1752a). All functions, property, records and personnel of the Bureau of Federal Credit Unions were transferred to the National Credit Union Administration by Pub. L. 91-206.

such understanding and intent being known to the said Board of Directors and Officers at the time of such approval.

This Notice then sets forth in detail the facts upon which the foregoing allegations are based. It then set this matter down for a hearing on August 24, 1971, at the U.S. Courthouse, Topeka, Kansas, before the undersigned to determine whether an order to cease and desist from the aforementioned practices should be issued to this Credit Union. [See Notice of Charges—Docket File].

By letter dated July 13, 1971, from the Administrator, the undersigned was designated as the Hearing Examiner to conduct this hearing. [See Ex. H-1, TR. 5].[2]

On August 9, 1971, the Respondent through its counsel, filed its answer to the Administrator's Notice of Charges, which included a motion to dismiss this action. This motion was denied by the Administrator in his letter to Respondent's counsel dated August 16, 1971.

The hearing as scheduled was held at the designated place on August 24, 1971, pursuant to the provisions of Section 206(e)(1) of the Act, (12 U.S.C. 1786(e)(1), the Administrative Procedure Act, (5 U.S.C. 500 et seq.) and Part 747 of the Rules of Practice and Procedure of the Administration, (12 CFR 747.1-747.50).

The Administrator appeared and participated at this hearing through his counsel, Brian H. Rhatigan, Assistant General Counsel, National Credit Union Administration, Washington, D. C., and this Credit Union appeared and participated through its counsel, Davis, Bruce & Davis, Wichita, Kansas, by Dale W. Bruce, Esquire.

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2. Abbreviations hereinafter have the following meanings:
TR. 5 —page 5 of the transcript of the hearing.
Ex. G-1—Government's exhibit number 1 in evidence.
Ex. R-1—Respondent's exhibit number 1 in evidence.
Ex. H-1—Hearing Examiner's exhibit number 1 in evidence.

At the commencement of this hearing, Respondent's counsel filed a Motion for Summary Judgment, which upon referral to the Administrator was denied by him in his letter to counsel dated August 30, 1971.

After receipt of the transcript of the hearing proceedings, briefs, proposed findings of fact, conclusions of law and proposed orders, as well as reply briefs, were filed by both parties.

After full consideration of this record in its entirety, including all papers and and documents contained in the docket file herein, the transcript of the testimony and arguments, the exhibits and all briefs, proposed findings of fact and conclusions of law, it is concluded that the reliable, probative and substantial evidence of this record establishes the following facts:

Findings of Fact

1. The Forbes Credit Union (this Credit Union) located at the Forbes at the Forbes Air Force Base, Topeka, was originally granted a charter, numbered 11258 in 1956. [TR. 30].

2. The Department of Defense, through its then Assistant Secretary for Manpower, Thomas D. Morris, by a letter dated January 28, 1967, asked the Bureau of Federal Credit Unions (predecessor of the National Credit Administration, see footnote 1) to consider permitting Department of Defense affiliated credit unions, (hereinafter DOD credit unions) to amend their charters with respect to their fields of membership, i.e., a description contained in each credit union charter describing those individuals who are eligible for membership therein, to allow certain ineligible individuals to join DOD credit unions. Among other matters, this letter contains the following statements:

• • •

"Departmental directives encourage commanders to establish *convenient* credit union facilities as cooperative organizations to stimulate systematic savings and create a source of credit for both provident and productive purposes.

• • •

Because of certain geographical problems and organizational peculiarities, a large number of military personnel are not able to avail themselves of credit union privileges even though most military installations offer this service. These same geographical and organizational problems prevent other personnel from membership in the most *convenient* credit union. Military personnel who find themselves geographically separated from their parent organization (i.e., Recruiting Personnel, ROTC assignments, duty with civil agencies), are furnished normal services such as commissary and exchange privileges, and dispensary and hospital care *from the nearest military activity providing such services.*

• • •

Current BFCU regulations covering fields of membership for credit unions on military installations, are, we believe, not sufficiently flexible to meet the peculiar geographical and organizational problems which are uniquely faced by many military members. In order to correct this situation, request your consideration of an amendment to BFCU regulations which would permit a member of the armed services, either active or retired or his legal survivors, to become a member of a credit union *located on the military installation which provides other services to that member or survivor.* Such an amendment would permit virtually all person-

nel of the Department of Defense located within the continental limits of the United States to *actively participate* in a military credit union." (Italics supplied). [Ex. G-3; TR. 30-31].

3. By letter dated February 10, 1967, the then Director of the Bureau, J. Deane Gannon, informed Mr. Morris that DOD credit unions would be allowed to include in their fields of membership, the following:

"Members of the U.S. Armed Forces, active or retired, or their dependent survivors who are eligible by law or regulations to receive benefits or services from the above military installation." [Ex. G-4; TR. 34-35].

It is this amendment, hereinafter referred to as "the 1967 Amendment," which forms the basis for the present controversy.

4. The availability and rationale in support of this 1967 Amendment, was made known to the credit union industry, including all DOD credit unions, through the publication and dissemination by U. S. Mail to such credit unions of the Bureau of Federal Credit Unions Bulletin, Vol. 7, No. 2 dated April, 1967. At page 8 of this Bulletin, under the section entitled, "Charter Amendments Available," the following statements appear:

• • •

"A combination of all these amendments results in a long and complicated field of membership description and still may not include many people in the military community *of a given base* who should be eligible for credit union service. Among these are families of overseas military personnel *in the vicinity of the base* from which the servicemen left for overseas duty before be-

coming credit union members, recruiting officers, ROTC personnel and other scattered military personnel.

Military personnel and their dependents *who regularly use the services and facilities of an installation* become a part of the military community of *that* base and have a common bond with the basic group that forms the field of membership of the credit union *at that location.*" (Italics supplied).

• • •

There is then set out the wording of the available 1967 Amendment as it appears in Finding of Fact number 3 supra. [Ex. G-9, p. 8; TR. 44, 45, 50].

5. On April 21, 1967, representatives of the Forbes Federal Credit Union met with the then Regional Representative of the Bureau in Kansas City, and requested a revision of this Credit Union's field of membership to include the 1967 Amendment. On April 24, 1967, this Regional Representative forwarded the necessary documents to Mr. John B. Rucker, Jr., President of this Credit Union. By his letter dated May 5, 1967, the Regional Representative notified Mr. Rucker that its requested charter amendment had been approved and was effective on that date. This amendment to this Credit Union's charter number 11258, was in the language set forth in Finding of Fact number 3, supra. [Ex. G-1, G-5, G-6, G-7, G-8; TR. 37-40].

6. Subsequent to April, 1967, and prior to June, 1967, some confusion as to the intent and construction of the 1967 Amendment arose within the credit union industry. This confusion was evidenced by letters from some of the Bureau's regional offices, directed to the Bureau's headquarter office asking whether or not this amendment would allow a given credit union to serve any and all military personnel,

regardless of whether or not such personnel received other benefits or services from the military base at which the DOD credit union was located. [TR. 115].

7. In order to clarify this confusion and to avoid any further misinterpretation of the 1967 Amendment, the Bureau on June 29, 1967 sent a memorandum to all of its Regional Representatives, Associate Regional Representatives and Examiners, setting forth its interpretation of this amendment in the following language:

• • •

> "The Bureau interprets the subject clause as applying only to those persons who are so situated that they can and in fact do utilize the benefits or services provided by the named installation. This is necessary to assure that the person is a part of the military community of the installation." [Ex. G-10; TR. 52-54].

In addition, the April 1967 edition of the Bureau's Guide to Standard Amendments of Federal Credit Union Charter and By-laws was revised in July, 1967, setting forth the Bureau's interpretation of the 1967 Amendment in the exact words set forth in the memorandum quoted above. [Ex. G-11, p. 7; TR. 51, 52, 55-57].

8. The credit union industry was advised of the Bureau's interpretation of the 1967 Amendment by publication and dissemination through the U.S. Mail to all Federal Credit Unions, including all DOD credit unions, of its October, 1967, Bureau of Federal Credit Unions Bulletin, Vol. 7, No. 4. At page 11 of this Bulletin the following appears:

> "INTERPRETATIONS
>
> The April issue of the Bulletin contained information on a charter amendment available to credit unions serv-

ing military personnel, which would include, in the field of membership, military personnel and their dependents who regularly use the services and facilities of an installation. The Amendment contained the following wording:

• • •

(Then appeared the 1967 Amendment as set forth in Finding of Fact number 3, supra).

Many Federal credit unions subsequently obtained the amendment and are now providing needed credit union services.

To avoid any misunderstanding as to who would be eligible for membership by the adoption of the amendment, the following interpretation should be used as a guide:

> 'Those people who are so situated that they can, and in fact do, make fairly regular use of the benefits and services provided by the named installation.'

This is necessary to assure that the person is a part of the military community of the installation." [Ex. G-12, p. 11; TR. 56-57].

The Respondent herein, the Forbes Federal Credit Union, by stipulation, has acknowledged receipt of this October, 1967, Bureau Bulletin. [Ex. G-1, p. 3, para. 14; TR. 57].

9. The August, 1968, edition of the Bureau's Guide of Federal Credit Union Standard Amendments set forth the Bureau's interpretation of the 1967 Amendment by adding three words—"and are receiving" to the original Amendment, so that this Amendment read as follows:

> "members of the U.S. Armed Forces, active or retired, or their dependents or dependent survivors who are eligible by law or regulations to receive and are receiving benefits or services from the above military installation."

This was followed by a repetition of the Bureau's interpretation and reasons therefore as set forth in the third and fourth quoted paragraph in Finding of Fact number 8, supra. [Ex. G-13, p. 7; TR. 58-60]

10. The current edition of the Bureau's Standard Amendments and Guidelines, issued in August, 1969, sets forth the 1967 Amendment with the words, "and are receiving" included therein, and is thus identical to the word quoted in the preceding Finding of Fact. Also included is the Bureau's interpretation and reasons therefore as set forth in the third and fourth quoted paragraph in Finding of Fact number 8, supra. [Ex. G-14, pp. 25, 26; TR. 58-60].

11. In April, 1969, Mr. Buford B. Lankford, the Regional Director of the National Credit Union Administration for the Austin Region, which services Topeka, Kansas, attended a meeting of the Kansas Credit Union League at Wichita, Kansas. During this meeting he talked with Mr. Rucker, the President of the Respondent Credit Union, and during this conversation, Mr. Rucker advised that his credit union disagreed with the Bureau's interpretation of the 1967 Amendment. Furthermore, in May, 1969, Mr. Lankford was telephoned by Mr. Rucker, during which conversation Mr. Rucker advised that his credit union was going to Sewart Air Force Base in Tennessee, which base was closing, to purchase Sewart Credit Union accounts and take new members into the Forbes Credit Union. Mr. Lankford advised Mr. Rucker that such activity was not in accord with the

Bureau's interpretation of Forbes 1967 charter amendment. Mr. Rucker then asked if his credit union's field of membership could be further amended to include Sewart, and was advised by Mr. Lankford that he doubted that such an amendment was possible. These conversations constitute clear and convincing evidence of the actual knowledge of the Bureau's interpretation of this 1967 Amendment by the Respondent herein. [TR. 122-125].

12. At a special meeting of the Board of Directors of the Respondent Credit Union on May 12, 1969, and at the regular Board of Directors meeting on June 16, 1969, the respondent resolved to ". . . extend services to all eligible personnel at Sewart Air Force Base, Tennessee."

The Respondent purportedly adopted this resolution as consistent with the literal wording of the 1967 Amendment to its charter. The Respondent insists that its construction of the 1967 amendment is proper. This construction is that any and all members of the U. S. Armed Forces, active or retired, or their dependents or dependent survivors are eligible by law or regulation to receive benefits or services from the Forbes Air Force Base, irrespective of whether or not any such individual actually is receiving or will receive such service or benefit, and thus such individuals are properly within its field of membership.

Pursuant to its construction, the Respondent, with the permission of the Base Commander, opened a sub-office in the same building which housed the Sewart Federal Credit Union, at the Sewart Air Force Base. On May 26, 1969, the Respondent hired an individual to represent it at Sewart, and from that date until this sub-office was closed on March 31, 1970, it accepted persons at Sewart into its membership without regard to any real or projected relationship with Forbes Air Force Base. The Respondent purchased 197 loans, amounting to $208,694.21 from the Sewart Federal

Credit Union, and accepted 1150 members with $440,000 in shares and granted 1,300 loans to these persons in excess of $1,600,000.

Some of these new members were ultimately transferred to Forbes Air Force Base and others were transferred elsewhere. [Ex. G-1, para. 3, Memorandum of Stipulation; Ex. G-2, Notice of Charges, para. 5i].

It is these transactions at Sewart that the Government alleges were improper, i.e., accepting as members and granting loans to individuals who were not and were not to become part of the Forbes Air Force Base military community.

13. By a letter dated November 28, 1969, the Respondent requested the Regional Representative of the Bureau for an alteration in its field of membership in a particular not pertinent to this case. In the process of effecting this requested change, the Regional office of the Bureau sent to the Respondent a retyped field of membership, which included the requested alteration. In addition, the words "and are receiving" had been inserted into this field of membership following the word "receive", so that the altered field of membership, as it related to the 1967 Amendment, appeared in the language as set forth in the 1968 edition of the Bureau's Guide of Standard Amendments. (See Findings of Fact No. 9, supra). The Respondent returned this field of membership to the Regional Office of the Bureau with its letter of December 17, 1969, asking that it be retyped deleting the words "and are receiving". The Bureau's Regional office thereafter returned this field of membership, approved as of January 26, 1970, with the words "and are receiving" deleted.

Respondent relies upon this incident as proof that the 1967 Amendment, as it applied to its field of membership,

was not restricted by the Bureau's interpretation. [Ex. G-1, pp. 4, 5, paras. 18-21; Ex. R-6, R-7, R-8; TR 163-171].

14. During October, 1970, a Supervisory Examination was made of the Respondent Credit Union by a Federal Credit Union Examiner, covering the period from January, 1969, to September, 1970. The results of this examination were discussed with officials of the Respondent and further communicated to the Respondent by mailing a copy of the Examiner's report to this Credit Union with a cover letter dated November 4, 1970. Among other things, the following areas of concern and requested corrective action are set forth in this report:

"FIELD OF MEMBERSHIP:

1. Record in the board minutes a clear cut statement of policy to the effect that the credit union will operate within the field of membership as interpreted by the National Credit Union Administration.

2. Notify the Regional office of the National Credit Union Administration of the above action promptly and determine that the credit union follows the established policy." [Ex. G-16, G-17].

15. By letter dated December 10, 1970, the Respondent through its President, Mr. Rucker, advised the Regional Director of the Administration that it intended to serve its members, "... within the field of membership as interpreted by the ordinary meaning of the words. No other interpretation will be accepted." Attached to this letter was a copy of a letter to the Kansas Credit Union League, dated December 2, 1970, from Dale W. Bruce, General Counsel, Respondent's counsel herein, setting forth Mr. Bruce's legal

arguments and cited authorities in support of the Respondent's stated position.

Respondent's letter of December 10, 1970, constituted its continued refusal to accept the Administration's construction of the 1967 Amendment and to implement the corrective action requested in the Supervisory Examination Report. (See Finding of Fact No. 14, supra). [Ex. R-4].

16. By his letter dated January 25, 1971, addressed to the Respondent, the Regional Director of the Administration advised that the Respondent's letter of December 10, 1970 and the opinion of Mr. Bruce attached thereto, had "been carefully considered" both in the Regional and headquarter's office of the Administration, and that the Respondent's position was not acceptable. The Administration further advised that it expected compliance with its interpretation of the 1967 Amendment, as set forth in the October, 1967, edition of the Bureau's Bulletin, and requested a reply on or before March 15, that the Respondent's board of directors had accepted and would operate within the limitations set forth in this interpretation. [Ex. R-5].

17. The record of this matter (see Ex. G-1, para. A, Conditional Stipulations) further reflects that the Administrator on April 7, 1971, issued a Notice of Intention to Revoke Approval of Charter Amendment approved May 5, 1967, (the 1967 Amendment) to the Respondent herein. This Notice also directed the Respondent to ". . . immediately cease accepting for membership in the credit union those persons who are not specifically defined as eligible for membership under the terminology and intent of the charter amendment approved on May 5, 1967." (See p. 3—Notice of Intention).

On April 21, 1971, the Respondent filed a Civil Action (No. T-4918) in the United States District Court for the District of Kansas, seeking, among other things, an order which would enjoin the Administrator from issuing any cease and desist orders without affording the Respondent a hearing as provided in the Act and a declaration that the April 7, 1971, Notice was a nullity.

Thereafter, the April 7, 1971, Notice was withdrawn by the Administrator, by his letter dated June 18, 1971, and the Respondent advised that a Notice of Charges pursuant to 206(e)(1) of the Act would be forthcoming. Upon the Respondent's motion, and based upon the above withdrawal of the April 7, 1971, Notice, Civil Action (No. T-4918) was ordered dismissed by United States District Judge Templar on June 24, 1971. [Ex. G-1 and documents attached thereto].

On July 13, 1971, the Administrator issued his Notice of Charges upon which the hearing herein has been held. [See Notice of Charges—Docket File].

Parties' Contentions

It is the Government's position herein that the 1967 Amendment to the Forbes Federal Credit Union charter's field of membership, in the words set forth in Finding of Fact number 3, supra, incorporates by operation of law, the provisions of the Act, including the requirement of common bond (12 U.S.C. 1759). This amendment, therefore, to be within the statutory limits set out in the Act, must be interpreted to be restricted to those otherwise qualified individuals who are so situated that they can, and in fact do, make fairly regular use of the benefits and services provided by the named military installation. Further, that this necessary interpretation was known, or should have been known by the Respondent, prior to its transactions at the Sewart Air Force Base, beginning in May, 1969, that the

Respondent was and is bound by the Administration's interpretation and thus the specified activity at Sewart constituted a failure on the part of this Credit Union and its Board of Directors and Officers to exercise effective control of the affairs of this Credit Union.

Therefore, the Administrator should issue an Order to the Respondent to cease and desist, in the future from noncompliance with the Administration's interpretation of the 1967 Amendment. (See Government briefs).

The Respondent contends that the Administration "... is bound by the usual and ordinary meaning of the words," of the 1967 Amendment as set out in Finding of Fact number 3, that the Administrator may not limit the Respondent's field of membership by its interpretation which in effect is a further amendment to the 1967 Amendment not permitted by law, that the Administrator has failed to show any standard by which fields of membership are established for credit unions and that the Administrator, by naming the Board of Directors and Officers, together with the Credit Union in his Notice of Charges, rather than the Credit Union only, is proceeding improperly under the cited Section 206(e)(1) of the Act (12 U.S.C. 1786(e)(1)).

As a consequence of Respondent's first contention, it believes that it may admit to membership in its credit union, any otherwise qualified person regardless of whether they are so situated that they can, and in fact do, make fairly regular use of the benefits and services provided by Forbes Air Force Base at Topeka, Kansas. Under the Respondent's literal interpretation of their 1967 Amendment, they believe that their activity at Sewart Air Force Base in Tennessee were within their field of membership and consequently, the Administrator's proposed order to cease and desist from said activity, in the future, and to adopt and implement the Administrator's interpretation, are legally

improper and no such order should issue. (See Respondent's briefs).

Opinion

The controlling question to be decided here is whether the Administrator's interpretation of the 1967 Amendment is within his authority or whether his actions constitute a further amendment to the 1967 Amendment and beyond his authority.

Congress has defined those individuals who may be accepted as members in a Federal Credit Union in Section 109 of the Federal Credit Union Act; as follows:

> "Membership
>
> Federal credit union membership shall consist of the incorporators and such other persons and incorporated and unincorporated organizations, *to the extent permitted by rules and regulations prescribed by the Administrator,* as may be elected to membership and as such shall each subscribe to at least one share of its stock and pay the initial installment thereon and the entrance fee; *except that Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well defined neighborhood, community, or rural district.* * * *." (12 U.S.C. 1759). (Italics supplied).

Congress specifically named the incorporators of a Federal credit union as necessary members and then vested in the Administrator authority to further delineated membership by rules and regulations, subject however, to the requirement that any individual or group, to be eligible for membership, must possess a "common bond" of occupation or association or be within a well defined neighborhood, community or rural district.

In May, 1967, the Director of the Bureau of Federal Credit Unions, the predecessor of the present Administrator of the National Credit Union Administration (see footnote 1 supra) republished the current edition of a pamphlet entitled "Organizing a Federal Credit Union." The purpose of this pamphlet, as stated in its Forward, was to assist those involved with or interested in Federal credit unions in knowing the procedures involved in organizing and conducting a Federal credit union. At page 3 of this pamphlet, the following explanation of the statutorily required "common bond" appears as follows:

"COMMON BOND

The Bureau of Federal Credit Unions defines and explains common bond, as applied to Federal credit union chartering, as follows:

> 'Common bond is that pre-existing condition which causes the members of a group to associate together, to know each other, to have common interests and purposes, and to be able and willing to work together to accomplish group objectives. A group has a common bond when it is composed of people who have the same employer, or are otherwise associated through some common interest or enterprise, *and* are so situated in relation to each other as a consequence of that community of employment or association that they could be expected to operate effectively as a cooperative organization for credit union purposes.
>
> 'A group, to qualify for a Federal credit union charter, should provide opportunities for the members to associate together, and, as a result of such association, to develop common loyalties and mu-

tual interests. Furthermore, in an associational group, the members must receive substantial benefit from membership in the association. * * *' "

At page 5 of this pamphlet, under Section III, the following appears:

"GROUPS ELIGIBLE FOR A FEDERAL CREDIT UNION CHARTER

Each application for a Federal credit union charter is considered on its own merits. From experience gained in granting thousands of charters, however, it has been possible to arrive at certain general principles. These principles will be discussed separately for occupational, associational and residential groups.

OCCUPATIONAL GROUPS

* * *

Successful credit union operation is greatly influenced by convenience to the members. An easily accessible location with office hours set to meet the needs of the members encourages them to come in often and use the credit unions' services and stimulates them to save regularly. In this way, the members, officers, and employees get to know each other and to feel that the credit union really belongs to them. The feeling of personalized, helpful service tends to become lost when a credit union's field of membership is too large or widespread. Loss of this personalized service may out-weigh any advantage mere size can provide in credit unions with large potential fields of membership."

At pages 8 and 9 of this pamphlet, within the Section covering Occupational Groups, appears a sub-group desig-

nated; "4. Groups at Military Installations." Among others, the following statements appear:

* * *

"A credit union usually will serve all civilian and military personnel who work or are stationed at a given base.

* * *

Some individuals or units are merely 'attached' to an installation, as for example, personnel attached for administrative purposes and support functions such as housing quarters, messing, payroll, supplies, and other services. These individuals or units may not be under the jurisdiction of the commanding officer of the basic group. * * *

Examples of 'attached' individuals or groups are: recruiters, ROTC instructors stationed at colleges, and personnel at radar stations. * * *"

(There then follows two paragraphs directed to naval personnel afloat and Department of Defense personnel outside the United States or aboard U. S. Navy ships.)

"If the credit union is located at a Department of Defense installation, it may also serve retired members of the Armed Forces of the United States Government who regularly utilize the facilities of the particular installation involved.

A credit union at a military base may include retired military members and dependent survivors of active or retired military personnel who are eligible by law or regulations to receive benefits or services from the military installation. Such broad coverage eliminates the need for specifically including some more limited groups that might otherwise be named." [Ex. G-15; TR. 66-68].

In the absence of judicial precedent to the contrary, and the writer has been referred to none, the foregoing statements and pamphlet (Ex. G-75), issued by the Director of the Bureau charged by Congress to administer the Federal Credit Union Act, which has been adopted by the present Administration (TR. 66), represent the authoritative explanation of the intention of Congress in restricting Federal Credit Union membership to those possessing a "common bond." Throughout this pamphlet, and particularly the sections quoted, runs the central theme of the delivery of services to individuals who are closely associated with each other, from a location which is readily available, conveniently close and in one or more ways connected with the lives of the members.

It is clear, therefore, from a reading of Section 109 of the Act, (12 U.S.C. 1759) as properly interpreted, construed and applied to factual situations by the Administrator as evidenced by Exhibit G-15, that the Administrator has been given authority by Congress to approve for membership in a Federal credit union, only those individuals or organizations possessed of a pre-existing "common bond." Any approval for membership in a Federal credit union of individuals who do not have this pre-existing "common bond" would be a nullity, as beyond the delegated authority of the Administrator.

As this case and the facts herein clearly establish, the 1967 Amendment (see Finding of Fact number 3, supra) granted to the Respondent in May, 1967, is susceptible of at least two interpretations, that made by the Administrator, and that insisted upon by this Respondent. As Government counsel points out, a charter of a corporation has long been held to be a contract and the general rules of contract law apply to the granting, amending or repealing of such charters. See *Dartmouth College* v. *Woodword*, 4 U.S. 518, (1819).

Of almost equal antiquity, is the principle that laws which exist at the time and place of the making of a contract enter into and form a part of that contract as fully as if they were expressly incorporated therein. See *U. S. ex rel Von Hoffman* v. *The City of Quincy*, 71 U.S. 535 (1867); *Home Building and Loan Association* v. *Blaisdell*, 290 U.S. 3986 (1934); *Wood* v. *Lovett*, 313 U.S. 362 (1941).

Under these well established principles, the 1967 Amendment to Respondent's charter incorporated and was subject to all of the provisions of the Federal Credit Union Act, including the requirement of "common bond." The record herein clearly establishes that the Administrator intended this 1967 Amendment to be restricted to those otherwise qualified individuals who did have the common bond of being both eligible to receive services and benefits from the named installation, but also to those who regularly used such services and facilities of the installation and thereby became part of the military community of the base at which the credit union was located. This was precisely what the Department of Defense requested in its January 28, 1967, letter to the Bureau, (see Finding of Fact No. 2, supra), and it was with this understanding and intent that the Bureau granted the 1967 Amendment to this Respondent.

As was consistently stated and repeated by the Bureau, from the initial notice to the credit union industry of the availability of this amendment in April, 1967, (see Finding of Fact No. 4) down to its most recent and currently effective publication of August, 1969, (see Finding of Fact number 4 through 10, supra), in order to avoid confusion and any misunderstanding relating to this amendment:

> "the Bureau interprets the subject clause as applying only to those persons who are so situated that they can and in fact do utilize the benefits or services provided by the named installation. This is necessary to assure

that the person is a part of the military community of the installation." [Ex. G-11, p. 7].

This interpretation was not only within the Administrator's authority, but was required under the "common bond" restriction of Section 109 of the Act (12 U.S.C. 1759). Thus, the 1967 Amendment, as interpreted and construed by the Administrator, conforms to the requirements of the National Credit Union Act.

Conversely, if the interpretation advanced by the Respondent is adopted, namely that all members of the Armed Forces, active or retired or survivors, are eligible for membership in its credit union, even though they are so situated that they do not and physicially cannot utilize the benefits and services of the Forbes Air Force Base, and thus are not part of that military community, the statutory requirement of "common bond" is not met. Such an interpretation, therefore, makes this 1967 charter Amendment a nullity, as the Administrator does not have authority to grant, nor the Respondent to accept, any field of membership that is not consistent with the "common bond" requirement of Section 109 of the Act, (12 U.S.C. 1759).

It is therefore held that the interpretation of the 1967 Charter Amendment issued by the Administrator is not only within the Administrator's delegated authority, but is a necessary restrictive interpretation of the literal words of this amendment to bring it within the statutory requirement of "common bond" decreed by Congress in the Federal Credit Union Act. Respondent's contention that this interpretation is in fact a restrictive amendment to its charter, to which it has not agreed, is not supported by the facts of this record nor the law.

Thus, the one issue to which both parties have stipulated is presented by this case, (see Ex. G-1, Memorandum

of Stipulation, pp. 4, 5), under the foregoing rationale, is answered as follows:

The Respondent may not properly interpret the words of the 1967 Charter Amendment (see Finding of Fact No. 3) by the literal, ordinary and usual meaning of these words, because such an interpretation results in voiding this amendment. In order for the Respondent's 1967 Charter Amendment to be legally viable, it must be interpreted consistent with the Administrator's interpretation. If the Respondent desires to operate its Federal Credit Union, it must do so within the limitations dictated by the Federal Credit Union Act, as properly interpreted and applied by the Administrator, who has been charged by Congress to administer this Act.

The remaining portions of Respondent's contentions are readily answerable from the facts of this record.

In the Memorandum of Stipulation, (Ex. G-1, p. 5), Respondent's counsel contends that the Administrator is attempting to restrict the Respondent's field of membership, by his interpretation of the 1967 Charter Amendment, which have been communicated to the Respondent without ". . . standards consistent throughout the entire credit union establishment and especially consistent with the description of the field of membership of other defense credit unions."

In support of this argument, the Respondent relies upon the field of membership of the Pentagon Federal Credit Union (Ex. R-1) and the Navy Federal Credit Union (Ex. R-2 for identification).

The facts do not support this contention. The Administrator's interpretation of the 1967 Charter Amendment was mailed to all Federal Credit Unions, including all DOD Credit Unions, in the April, 1967, edition of the Bureau of Federal Credit Unions Bulletin, Vol. 7, No. 2 (see Finding of Fact number 4, supra). The Administrator's interpre-

tation, which has been consistent from the beginning, was again communicated to the credit union industry, both internally (see Finding of Fact number 7) and externally (see Finding of Fact number 8) in June and October, 1967. This interpretation was again distributed and made available to the industry in August, 1968, (see Finding of Fact number 9) and to this day is available to the industry, (see Finding of Fact number 10).

The standards governing the Administrator's actions under the Act, and his interpretations of this law, are set forth not only in the Act itself, (12 U.S.C. 1751 et esq.), but in the publication "Organizing a Federal Credit Union" (Ex. G-15) which has been readily available for many years from both the Administration or the U. S. Government Printing Office. (TR. 66-68).

The Administrator's application of his interpretation of the 1967 Charter Amendment has been consistent throughout the DOD credit union industry. As testified to by Mr. Gannon, from 1953 to 1970, the Director of the Bureau of Federal Credit Unions, and since 1970, the Deputy Administrator of the Administration, some DOD credit unions, have the 1967 Charter Amendment as worded in Finding of Fact number 3, but the majority adopted this Amendment as worded in Finding of Fact number 9, (with the words, "and are receiving" added after the word "receive"). The Administration has taken the position that the wording of either field of membership conveys the same authority, the same field of membership, neither is either broader or more restricted than the other. No evidence was presented to the contrary. Furthermore, approximately 60 DOD Federal Credit Unions adopted this 1967 Amendment as originally worded, i.e., without the words "and are receiving" added thereto. The Administration has experienced nor is it aware of any resistence by these credit unions to accept the Administrators interpretation. [TR. 27, 28, 60-62, 115, 275].

Respondent's reliance on the fields of membership of the Pentagon and Navy Credit Unions is ill founded.

An examination of the Act and regulations promulgated thereunder fails to reveal any legal requirement that the fields of membership of DOD credit unions be identical. The record does contain the statements of counsel that there is no such legal requirement and the writer has been referred to none. To the contrary, the expressed position of the Administration is that, "Each application for a Federal Credit Union charter is considered on its own merits." [Ex. G-15, p. 5]. As the record herein clearly reveals, the fact situations surrounding different DOD credit unions are different and consequently, within the limits of the Act, the fields of membership of these credit unions differ. (See fields of memberships attached to Exhibits R-9 and R-10).

As to the fields of membership for the Pentagon (Ex. R-1) and Navy (Ex. R-2 for identification) Federal Credit Unions, an examination of these documents reveals that the statutory requirement of "common bond" has been adhered to by way of restricting membership to those who work in the Pentagon Building, to those who work in specified, nearby geographical locations, i.e., District of Columbia, Arlington or Fairfax County, Virginia, or Alexandria, Virginia, and excepts those located geographically nearby, (i.e., at Bolling Air Force Base, Gravelly Point, Forts Meyer, Belvoir, McNair) and served by other credit unions, etc. The Navy Federal Credit Union's field of membership is similarly in conformity with the statutory "common bond" requirement by extensive and detailed descriptions of eligible and ineligible persons and groups. It is true, that each of these fields of membership contain some broad provisions, i.e., "Commissioned and Warrant Officers of the United States Army and United States Air Force;" (Ex. R-1), "Commissioned and Warrant Officers of the U. S. Navy and

Marine Corps. on active duty except active duty for training;" (Ex. R-2 for identification), etc. The explanation for such broad provisions, as testified to by Mr. Gannon, for the purposes of this case are entirely adequate. He stated that both of these credit unions predate most all DOD credit unions, and in the early days were the only ones serving the military. Thus, these broad fields of membership were considered both necessary and in conformity with the occupational "common bond" requirement of the Act. [TR. 102-104].

The Respondent in this case relies upon the incident set forth in Finding of Fact number 13 as proof that it is not bound by the Administrator's interpretation of its 1967 Charter Amendment, and as proof of the Administration's acquiescence in its own interpretation. The record herein does not support this contention.

Mr. Lankford testified that his authority in countersigning fields of membership extended only to approval of previously issued fields of membership, and that he does not have authority to alter the wording of a previously approved charter amendment without the consent of the credit union involved. Thus, in acceding to the Respondent's request to delete the words "and are receiving" from the updated and retyped amendment, he intended and had authority only to approve the Respondent's previously issued and approved field of membership. Therefore, this re-issued field of membership, to conform to the legal requirements of "common bond" was as subject to the Administrator's interpretation during this occurrence in late 1969 and early 1970 as it had been from its initial approval in May, 1967. [TR. 249-262].

In the light of all of the circumstances of this case, as reflected in this record, Respondent's reliance upon this occurrence, which took place after most of Respondent's activities at Sewart had been completed, is ill founded.

During the hearing in this matter, the Respondent introduced into evidence exhibits R-9 and 9-10. Exhibit R-9 is a list of 32 DOD Federal credit unions, with copies of their fields of memberships attached, which fields of membership do not contain the words "and are receiving." These charter amendments bear dates ranging from April, 1967 through November 4, 1970. Exhibit R-10 is a similar list of 26 DOD credit unions, with similar attachments, which fields of membership do contain the words "and are receiving." These amendments bear dates ranging from February, 1969 through November, 1970.

The Respondent contends that these two exhibits prove the significance of the words "and are receiving" in fields of membership, i.e., that charters with these words are different from and more restricted than those charters which do not have these words. Thus, there are two different types of fields of membership existent in the DOD credit union industry. Additionally, because these lists do not show any point of time or beginning date when these words were "added" or cut-off date for the issuance of charters without these words, or the "deletion" of these words from charters previously containing them, this is further evidence of the inconsistent administration of the Act by the Administrator. (Respondent's Brief, p. 4).

On their face, these exhibits would appear to support some of the Respondent's contentions. However, when examined together with testimony of Mr. Lankford, the Administration's Regional Director, these exhibits do not support any of the Respondent's contentions.

After the receipt of, and pursuant to guidelines and directives from the Washington headquarters office in June or July, 1967, all fields of membership for DOD credit unions issued by the Regional offices of the administration as they relate to the military personnel amendment pertinent here,

have included the words "and are receiving." Any such fields of membership issued prior to that time did not include these words.

The Regional directors do not have authority to unilaterally alter previously issued and approved fields of membership unless agreed to by any given credit union.

The 32 credit unions listed in Exhibit R-9 are those DOD credit unions who originally obtained the 1967 charter amendment prior to June or July, 1967, and, therefore, these amendments do not contain the words "and are receiving." The dates listed in Exhibit R-9, next to each such credit union, do not represent the date when this 1967 charter amendment was initially issued or approved for each such credit union, but rather, dates when the fields of membership of these organizations were changed in some other respect not connected to the military personnel amendment which is the subject of this controversy.

Similarly, the 26 DOD credit unions listed in Exhibit R-10 are those who were issued the 1967 Charter Amendment after June or July, 1967, and thus these amendments do contain the words, "and are receiving," not as words "added" to a previously issued amendment, but contained in their amendment as initially issued. The dates listed in this exhibit, may be the dates of the initial issuance of this military personnel amendment, or may be dates when other charter amendments were issued covering subject matters not connected with this 1967 Amendment. [TR. 263-269].

When this testimony is coupled with that of Deputy Administrator Gannon, to the effect that the Administration considers all fields of membership of DOD credit unions to be equal in scope in this regard, whether they contain the words "and are receiving" or not, and under the Administration's interpretation of this amendment, herein held to be necessary to bring this amendment into conformity with

the requirements of the Act, it becomes clear that Exhibits R-9 and R-10 do not establish two different types of fields of membership, nor any inconsistent administration of the Act.

The Respondent in their answer to the Notice of Charges (see docket file) contend that they neither had notice of nor could they be charged with notice of the Administrator's interpretation of the 1967 Amendment to their charter, unless such interpretation was published in the Federal Register.

Neither the law nor facts of this record support this contention.

The record herein clearly establishes that this Respondent had actual notice of the Administration's interpretation prior to its activities at Sewart Air Force Base which began in the latter part of May, 1969. (Ex. G-2).

The April, 1967, edition of the Bureau of Federal Credit Union's Bulletin, which was mailed to all DOD Federal Credit Unions, contained this interpretation and the reasons for it. (See Finding of Fact number 4, supra).

The October, 1967, edition of this Bulletin, also containing the Administrator's interpretation, was likewise mailed to all DOD credit unions, and the Respondent's have stipulated to its receipt. (See Finding of Fact number 8).

On two occasions in April and May of 1969, the Respondent's President talked with Mr. Lankford, the Regional Director. These conversations clearly establish that Respondent knew of the Administration's interpretations. (See Finding of Fact number 11, supra).

The factual record therefore, which is unrebutted by any reliable evidence, conclusively establishes that Respondent had actual notice of the Administrator's interpretation of its 1967 Charter Amendment. Actual notice of a policy or interpretation is binding upon a party having

such notice, notwithstanding failure to publish in the Federal Register. See: 5 U.S.C. 552(a)(1)(E); *U.S. v. Aarons*, 310 F.2d 341 (CA 2, 1962); *Kessler v. F.C.C.*, 326 F.2d 673, (CA D.C., 1963); *Wyman-Gordon Company v. NLRB*, 397 F.2d 394 (CA 1, 1968).

Respondent contends in its brief, page 2, item no. 6, that no evidence was submitted to show that Exhibit G-3 was signed by any person who had authority to speak for the Department of Defense.

This contention is fallacious on its face. Respondent's counsel, in signing the memorandum of stipulation, which was admitted into evidence as Exhibit G-1 (TR 12), agreed to the truth and correctness of this document (as exhibit 1 attached to this memorandum), see Ex. G-1, p. 3. At page 31 of the transcript, this counsel stated that he did not question the validity or correctness of this exhibit.

The purpose of Respondent's citation of a Department of Defense policy set forth at 32 CFR 230.7 is not clear. (See Respondent's brief, p. 3 item No. 13).

This policy statement is not determinative here as the Act clearly lodges the responsibility for regulating Federal Credit Unions, including DOD Federal Credit Unions with the National Credit Union Administration, (12 U.S.C. 1751-1790).

Respondent contends at pages 15 and 16 of its brief that the Administrator, in citing and relying upon Section (206)(e)(1) of the Act, 12 U.S.C. 1786(e)(1) in issuing his Notice of Charges, has proceeded improperly because he has named, in the caption of this case, not only the Forbes Federal Credit Union, but also its Board of Directors and Officers, and further, that because he has not cited Section 206(g)(1), of the Act, 12 U.S.C. 1786(g)(1) and not produced any evidence of misconduct by the Board or Officers declared by this action to be improper and grounds for re-

moval from office, ". . . the proceedings herein cannot be sustained since the proper party is not involved in the hearing."

This contention is not supported by this record.

The Administrator has issued his Notice of Charges pursuant to and in conformity with Section 206(e)(1) of the Act (2 U.S.C. 1786(e)(1). He has named the corporate entity, the credit union, and has given a ". . . statement of facts constituting the alleged unsafe or unsound practice or practices." He fixed a time and place of hearing, which has been held pursuant to his duly promulgated regulations.

Exhibit G-1 clearly shows that the Notice of Charges are not to be construed as any alleged violation of Section 206(g)(1) of the Act nor as any criticism of the Board of Directors and Officers of this Credit Union other than as their actions relate to their refusal to accept the Administrator's interpretation of their field of membership. (See Memorandum of Stipulation, Ex. G-1, paras. numbered 1 and 2).

If the naming of the Board of Directors and Officers of the Respondent Credit Union in the caption of this case is in error, and it is not held here that it is in error in view of the fact that the corporate entity, like all others, has acted and can act only by and through such officials, and it has been the refusal of these individuals to adhere to the Administrator's proper directions which has given rise to this case, it is certainly a non-fatal, non-prejudicial error of form, not of substance, and does not divest the Administrator of authority to take this action pursuant to Section 206(g)(1) of the Act.

Respondent, at page 16 of its brief, item number 6, appears to argue that the Administration is bound by the signatures of its duly authorized agents and it should not be allowed to repudiate any such signatures.

The record herein is totally devoid of any evidence showing any attempt by the Administrator or anyone else attempting to repudiate the signature of any duly authorized agent. In fact, the record herein establishes the contrary, (see the testimony of the Regional Director, Mr. Lankford (TR. 249-252)).

One last point should be briefly touched upon. In some of Respondent's contentions and arguments, it is argued that the Administrator's actions herein are improper because they constitute a retroactive application of his interpretation of the 1967 Charter Amendmen. The record herein clearly establishes that the Administrator's actions here are to have an exclusive prospective effect. The Deputy Administrator testified; (TR. 116-118), as did the Regional Director (TR. 275), and their counsel has stipulated (Ex. G-1, para. 2), that it is not the intention of the Administration in this action to revoke the membership of those persons previously accepted as members as a result of Respondent's interpretation of the 1967 Charter Amendment. The Administrator only wishes adherence to his interpretation in the future which would prevent a repetition of actions such as Respondent engaged in at Sewart Air Force Base.

Conclusions of Law

1. The National Credit Union Administration has jurisdiction of the subject matter of this controversy under the provisions of the National Credit Union Act, 12 U.S.C. 1751-1790.

2. The Notice of Charges, issued by the Administrator, National Credit Union Administration on July 13, 1971, directed to the Respondent herein, was properly issued consistent with the provisions of Section 206(e)(1) of the National Credit Union Act, 12 U.S.C. 1786(e)(1).

3. That the amendment to the Respondent's charter no. 11258, approved by the Bureau of Federal Credit Unions on May 5, 1967, containing the following language,

> "Members of the U. S. Armed Forces, active or retired, or their dependent survivors who are eligible by law or regulations to receive benefits or services from the above military installation,"

has been and is subject to and restricted by the Bureau of Federal Credit Unions and the National Credit Union Administration's necessary and proper interpretation thereof, to persons otherwise qualified for membership who not only are eligible by law or regulations to receive, but who are receiving benefits or services from the Forbes Air Force Base, Topeka, Kansas.

4. The Respondent herein had actual notice of the foregoing interpretation prior to May, 1969, and has been bound by this interpretation since April, 1967 at the latest and continues to be bound thereby.

5. The Respondent Credit Union and its Board of Directors and Officers have not effectively controlled the affairs of this Credit Union as such affairs relate to the amendment to its charter as set forth in Conclusion number 3, supra.

6. This failure to exercise effective control is not consistent with the responsibilities and duties of said Board of Directors and Officers as set forth in the Federal Credit Union Act and the By-laws of the Respondent Credit Union and is contrary to the best interests of the membership of the Respondent Credit Union.

7. This failure to exercise effective control of the affairs of the Respondent Credit Union has been caused by the good faith but erroneous interpretation by the Board of Directors and Officers of the said credit union of the amendment to its charter approved on May 5, 1967, and further by the refusal of the Respondent, its Board of Directors and Officers to accept the necessary and proper interpretation of this Charter Amendment as issued by the Bureau of Federal Credit Unions and the National Credit Union Administration, and to control the affairs of said Credit Union consistent therewith.

8. That the activities of the Respondent at Sewart Air Force Base, Tennessee, as alleged in the Notice of Charges, and as said activities resulted in accepting as members and granting loans to persons who were not then and who did not become members of the military community of Forbes Air Force Base, Topeka, Kansas, were outside of the field of membership of this Respondent Credit Union and such activities were not within the provisions of the National Credit Union Act.

9. Consistent with paragraph 2 of the Memorandum of Stipulation entered herein as Exhibit G-1, the membership of those persons previously accepted by the Respondent as a result of Respondent's erroneous interpretation of their field of membership, as it relates to military personnel and survivors thereof, not be revoked.

10. In order for the Respondent to conduct its affairs within the limitations set forth in the National Credit Union Act, it is necessary for the said Respondent to cease and desist from interpreting the amendment to its charter as approved on May 5, 1967, in any manner inconsistent

with that interpretation of said amendment issued by the Bureau of Federal Credit Unions and the National Credit Union Administration.

Dated: January 10, 1972

Rockville, Maryland

William E. Brennan
Hearing Examiner